

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent, Hy Vee, in the summer of 2006. Claimant was working there as a salad bar clerk when, on August 16, 2006, she suffered an injury while performing her job duties for respondent. She had gone into the cooler and, while trying to move a heavy box of soup, she struck her left elbow on a metal rack. Claimant had to pull and tug on the box and in doing so, her arm and elbow were twisted and then she hit her elbow. She felt a sharp pain in her elbow and “that was about it.”¹ Claimant did not report the injury to anyone that day. Before the incident in the cooler, claimant did not have problems in either her hands or her arms. The October 16 incident occurred about mid afternoon. When she got home that evening, her arms were feeling tired, but they did not hurt “abnormally.”² When claimant woke up the next morning (August 17), she was having pain in both arms, and numbness and tingling in the fingers of both hands, especially in her left hand. She had never noticed that before.

At that time, claimant talked to respondent’s manager of perishables, Jon Hensley. Claimant told Mr. Hensley about the symptoms she was experiencing, the numbness and tingling in her fingers and the pain up her arm. And then, according to claimant, she asked Mr. Hensley if he had ever had an employee report those kind of problems to him in doing the job she did, and Mr. Hensley said “no.”³

A couple of days later, claimant talked to respondent’s produce manager, Joel Lichtenauer. Claimant was still having the symptoms of numbness and tingling and the pain in her arms. Claimant testified that she advised Mr. Lichtenauer of these symptoms and asked him if any employee, who had been working in the position claimant worked in, had ever reported those kinds of symptoms. Mr. Lichtenauer’s answer was “no.”⁴

A few days later, claimant talked to Jeremy Smith, respondent’s salad manager and claimant’s direct supervisor. Claimant told Mr. Smith about the symptoms she was having and told him that she had talked to Mr. Hensley and Mr. Lichtenauer, and that she was still having symptoms. Claimant asked Mr. Smith, who had “worked in a salad bar for years,” if he had ever heard of anything like this. She also asked him why she was having numbness or tingling in her arms, and asked if he could tell if there was something that she was doing, and Mr. Smith said “no.”⁵ Claimant testified that Mr. Smith told her she may just want to see her personal doctor.

¹ P.H. Trans. at 7.

² P.H. Trans. at 18.

³ P.H. Trans. at 8.

⁴ P.H. Trans. at 9.

⁵ P.H. Trans. at 10.

When claimant talked to these three supervisors (Mr. Smith, Mr. Hensley and Mr. Lichtenauer), she told them that she was having numbness in her hands and pain radiating up her arms. She spoke to them before August 24, 2006, which is the date that she saw her own family doctor. Claimant did not tell them about the incident where she bumped her elbow in the cooler.⁶

After talking to Mr. Smith, claimant went to see her own doctor, Dr. David Karty, the next day (August 24, 2006). Dr. Karty is a family physician at Olathe Medical Services, Inc. Dr. Karty's records are marked as an exhibit to the preliminary hearing.⁷ Claimant told Dr. Karty about the symptoms she was having, reporting that she was having numbness and tingling in her fingers and pain radiating up both arms and up her shoulders, and she told him that she must have injured herself somehow. She also told him that this had been going on for a couple of weeks. Dr. Karty's notes from the August 24 visit state that claimant had symptoms of numbness and tingling in both hands. The notes also state "L elbow last week lifting" and "heavy lift scraping washing, repetitive." That note also mentions Jeremy Smith, claimant's supervisor.⁸

Dr. Karty told claimant that if she injured herself at work, then they need to call her employer immediately. Dr. Karty had his nurse contact respondent, and the nurse spoke to Brian Stevens, an assistant store manager at respondent. Mr. Stevens advised the nurse that an injury on the job must be treated by respondent's work physician. Therefore, Dr. Karty advised claimant that since this is being reported by claimant as happening at work, Dr. Karty was not going to treat claimant.⁹

When claimant returned to work a day or two after the appointment with Dr. Karty, claimant talked to Mr. Stevens. She told Mr. Stevens that she was aware that Dr. Karty's office had called him. Claimant advised Mr. Stevens that she hurt herself at work, and Mr. Stevens "just said okay."¹⁰ Mr. Stevens did not offer any treatment.

Claimant was without medical treatment until she saw William H. Tiemann, M.D., at OHS Compicare, which claimant testified was not until the end of November or first of December 2006. But Dr. Tiemann's records, which are marked as an exhibit to the preliminary hearing, are for services rendered starting on November 2, 2006,

⁶ P.H. Trans. at 24.

⁷ P.H. Trans., Cl. Ex. 2.

⁸ *Id.*

⁹ On the note titled Patient Injury/Accident Information form, it says "not to be seen here."

¹⁰ P.H. Trans. at 12.

with follow-up visits on November 20 and 27. Claimant's final visit with Dr. Tiemann was on December 4, 2006.¹¹ Dr. Tiemann's treatment was through respondent.

Dr. Tiemann assessed claimant's left arm and tested her strength. He then ordered physical therapy and transdermal cortisone treatments to her left arm. After physical therapy was concluded, claimant reported to Dr. Tiemann that she was still having pain, so he provided her with steroid injections to the left elbow and deltoid area. The last time claimant saw Dr. Tiemann, which was on December 4, 2006, claimant reported that she was still having pain in her left arm. Dr. Tiemann advised claimant that it would just take time to heal. He released claimant from his care at that time. The pain in claimant's left arm was more confined to the elbow area.

In May 2007, claimant requested further treatment from Hy Vee. Claimant was advised that she needed to contact the corporate office for any further medical care.

On June 28, 2007, at the request of her attorney, claimant saw John A. Pazell, M.D. At that time, claimant was still having elbow pain, which she reported to Dr. Pazell. Dr. Pazell indicated that claimant needed to see an upper extremity specialist for her left arm, that the injury was located within the joint of the left elbow.

Claimant testified at the preliminary hearing that she is no longer having problems with her hands, but she is still having left elbow problems.

Claimant last worked for respondent on approximately September 21, 2006. She reported that the reason she left was "due cause employment termination."¹² After being unemployed for a period of about six weeks, claimant found work through a temporary employment agency. The first job, which lasted about three months, involved working in an office performing typing and filing activities. The next job, which lasted two months, involved computer work. After that, claimant worked a couple of other part-time jobs. Claimant currently works as an office manager. She began that job in June 2007. In that job, she does office work which involves using her hands and arms throughout the day.

Claimant indicated that her current elbow problems are better than they were when she worked for respondent. Claimant is still having elbow pain for which she takes Ibuprofen about once a day or once every other day. She acknowledged that her elbow hurts all the time. She described the symptoms as pain with "a kind of a grinding area" in the elbow joint that radiates pain up her upper arm and down into the forearm.¹³

¹¹ See P.H. Trans., Res. Ex. C.

¹² P.H. Trans. at 20.

¹³ P.H. Trans. at 23.

Respondent took the testimony of Jeremy Smith, who, at the time of claimant's August 2006 accident, was respondent's salad bar manager and claimant's direct supervisor. Mr. Smith testified that claimant never reported to him that she was hurt on the job, but she did call in sick one day, claiming that her arm was sore. Claimant did not say why her arm was sore and he did not ask her why. After that one telephone conversation, claimant never again mentioned having arm soreness. Mr. Smith does not recall when the telephone conversation occurred, but acknowledged that it could have occurred between August 16 and August 24, 2006.

Respondent also took the testimony of two other supervisors, Jon Hensley and Joel Lichtenauer. Mr. Hensley was respondent's manager of perishables. Mr. Hensley denied that claimant ever reported to him, during the time she worked at respondent, that she was hurt on the job. There was one occasion when claimant reported that she had injured her wrist. That conversation occurred the day after claimant called in and missed work. Mr. Hensley did not speak with her when she called in. Claimant never told him that her arm problems were related to her employment, and Mr. Hensley did not ask her if they were related to her employment.

After receiving notice in October 2006 from claimant's attorney that claimant was alleging injury on the job, Mr. Hensley filled out an accident report. That notice, which is a letter dated October 17, 2006, was marked as an exhibit to the preliminary hearing.¹⁴ The accident report was filled out on October 20, 2006, a copy of which was also marked as an exhibit to the preliminary hearing.¹⁵ Until receiving that notice from her attorney, Mr. Hensley did not have any idea that claimant was claiming she had been injured on the job. Mr. Hensley had only one conversation with claimant about her arm or arms hurting. It is his recollection that that conversation took place the day after claimant called in sick. He does not recall nor does he have a record of when that conversation took place, but stated that it would have had to have been sometime in August 2006. This conversation with claimant was a face-to-face conversation. He believes that claimant told him that she had hurt her wrist. It did not occur to Mr. Hensley to ask claimant how she had injured it. He admitted that he does not know for sure if claimant said that her wrist hurt or that she had hurt her wrist.

Mr. Hensley denied claimant ever asked him if other employees had this kind of problem in doing the type of job claimant did.

Joel Lichtenauer, who was respondent's produce manager at the time of his preliminary hearing testimony and also at the time of claimant's August 2006 accident,

¹⁴ See P.H. Trans., Res. Ex. B.

¹⁵ See P.H. Trans., Res. Ex. A.

acknowledged that claimant did report that she had been hurt on the job.¹⁶ He then testified that claimant just stated that her arm was hurting.¹⁷ She did not tell him how she had hurt it, and he did not ask her what happened. That one conversation, which occurred in August 2006, was the only time claimant ever mentioned to him any problems with her hands or arms. At one point during the preliminary hearing, Mr. Lichtenauer was asked if claimant ever told him that she was actually hurt on the job, and Mr. Lichtenauer responded “no.”¹⁸ Claimant said she was hurt, but she did not specify whether she did it at work or outside of work. Claimant said it was her arm that was hurt. But Mr. Lichtenauer thought it was her wrist because claimant was wearing “like a bowling brace” on her arm at the time she had this conversation with him.¹⁹ Mr. Lichtenauer did not inquire further because he knew that Mr. Smith and Mr. Hensley (Mr. Lichtenauer’s supervisor) were aware of claimant’s injury, and he thought they were going to take care of whatever was needed. Mr. Lichtenauer also testified that Mr. Smith is the one who actually told him of the incident. That conversation between Mr. Lichtenauer and Mr. Smith took place sometime in August 2006. It was at some point after that conversation with Mr. Smith that claimant told Mr. Lichtenauer that her arm was hurting.

Mr. Lichtenauer did not have any conversations with claimant about seeing a doctor. Claimant never reported to Mr. Lichtenauer an incident on August 16, 2006, when she bumped her elbow in the cooler.

Mr. Lichtenauer denied claimant ever asked him whether or not other employees, doing the kind of work claimant did, had developed problems with their hands and arms.

Respondent took the testimony of Brian Stevens, who is respondent’s manager of store operations, which is the same position he held in August 2006. He denied claimant ever told him that she was hurt on the job. He does not recall ever receiving a telephone call from a doctor’s office regarding claimant. Mr. Stevens does not recall ever having any conversation with claimant about her arms hurting, but acknowledged that it is possible a conversation could have taken place. While claimant was working at respondent, Mr. Stevens was never advised by Mr. Smith, Mr. Hensley or Mr. Lichtenauer that claimant was having a problem with her arm.

¹⁶ P.H. Trans. at 49.

¹⁷ P.H. Trans. at 50.

¹⁸ P.H. Trans. at 55.

¹⁹ P.H. Trans. at 56.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.²⁰

At the preliminary hearing, Joel Lichtenauer was asked whether claimant ever reported to him that she had been hurt on the job. He answered “yes”.²¹ Claimant also had conversations with other supervisors for respondent, describing arm or wrist pain and asking if those types of symptoms had been experienced by her supervisor or any other employees. It is difficult to imagine the questions being asked by claimant and the information being provided from claimant did not spark at least some question in the minds of respondent’s supervisors. The ALJ determined the issue of notice was a close call. And, so it is. But the claimant’s burden is by a preponderance. Here, the claimant has, for preliminary hearing purposes, proven that she provided notice to respondent in a timely manner, as is required by K.S.A. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant provided timely notice of her accident to respondent and the preliminary hearing Order of the ALJ should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated September 6, 2007, should be, and is hereby, affirmed.

²⁰ K.S.A. 44-520.

²¹ P.H. Trans. at 49.

²² K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of December, 2007.

BOARD MEMBER GARY M. KORTE

c: William D. Mize, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge